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Nos. 02-241 & 02-516

In the
Supreme Court of the United States

Barbara Grutter,
Petitioner,
v.
Lee Bollinger, et al.,
Respondents.

and

Jennifer Gratz and
Patrick Hamacher,
Petitioners,
v.
Lee Bollinger, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL COALITION OF BLACKS FOR REPARATIONS IN AMERICA (N'COBRA) AND THE NATIONAL CONFERENCE OF BLACK LAWYERS (NCBL) IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE IN SUPPORT OF RESPONDENT

Amicus National Coalition of Blacks for Reparations in America (N'COBRA) was founded in 1987 to work with individuals and other organizations to obtain reparations for the crimes against humanity known as chattel slavery and *de jure* and *de facto* racial discrimination.

Amicus National Conference of Black Lawyers (NCBL) was founded in 1968, with the mission of serving as the legal arm of the movement for Black liberation, protecting human rights, achieving self-determination of Africa and African communities and working in coalition to assist in ending oppression of all peoples.[1]

SUMMARY OF ARGUMENT

Affirmative action in education is supported by Respondents on two grounds: remedial action for past and present discrimination and promotion of campus diversity. This brief focuses exclusively on the first proposition, and recasts it in the language of reparations: affirmative action in education is justified as reparations for the crimes of slavery and *de jure* racial discrimination. Such reparations are not only permissible under the Equal Protection Clause of the Fourteenth Amendment, but may well be required in order to fulfill its mission.

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[1] This brief is submitted with the consent of the parties, as lodged with the Clerk per the Docket Sheets. Pursuant to Rule 37.6, counsel represent that this brief was not authored in whole or in part by counsel for any party. All expenses of amici have been borne by their own resources, without support from any party. Counsel have served *pro bono publico*.

The Fourteenth Amendment is not a purely 'color blind' enactment, but is a necessary legal tool for equality in the aftermath of chattel slavery. Use of the Fourteenth Amendment to strike down reparations for African Americans is strikingly inapposite to its purpose, language and intent.

Strict scrutiny is not required in the cases before the Court today. Suspect racial classification is not required under a remedial affirmative action analysis, since the recipients are identified on the basis of a common injury rather than race. If the injured persons are in fact identified racially, that identification was made by the oppressors rather than the oppressed. Consequently, a less stringent level of review is appropriate here.

The remedial use of affirmative action is entirely consistent with Equal Protection, as demonstrated in the obligations of the United States under the *Convention on the Elimination of All Forms of Racial Discrimination*.

The Michigan affirmative action educational programs before the Court today should be upheld as reparations to African Americans. If remand is necessary, lower courts should be instructed to uphold the programs to the extent they satisfy this compelling state interest.

ARGUMENT

THE FOURTEENTH AMENDMENT SUPPORTS AFFIRMATIVE ACTION IN EDUCATION AS REPARATIONS FOR THE CRIMES OF SLAVERY AND *DE JURE* RACIAL DISCRIMINATION

I. AFFIRMATIVE ACTION IN EDUCATION DESIGNED AS REPARATIONS FOR THE CRIMES OF SLAVERY AND *DE JURE* RACIAL DISCRIMINATION IS NOT PROHIBITED BY THE FOURTEENTH AMENDMENT

Throughout most of its history, the United States has been an exceedingly hostile place for Africans and their descendants.[2] Slavery, genocide and *de jure* racial discrimination are now recognized as either crimes against humanity or contrary to international law under treaties ratified by the United States. See *International Convention on the Elimination of All Forms of Racial Discrimination*, Dec. 21, 1965 (adopted by General Assembly), K.A.V. 2307, 5 I.L.M 352 (1966), 660 U.N.T.S. 195, 216-218, art. 1, ¶ 4, art. 2, ¶ 2 (requiring remedial affirmative action until the effects of racial discrimination are overcome) *ratification in* 140 Cong. Rec. 14,326 (1994); *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948 (adoption by General Assembly), K.A.V. 2303, 78 U.N.T.S. 277, 278-280, art. I ("genocide...is a crime under international law"); *Additional Article to the Treaty for the Suppression of the African Slave Trade*, Feb. 17, 1863 (signed), U.S.-G.B., T.S. 127, 18 Stat. (2) 345; *Treaty*

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[2] Other minority groups were targets of hostility and discrimination as well. See, *e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 244-245 (Stevens, dissenting opinion) (discussing discrimination against Japanese-Americans and Native Americans).

between United States and Great Britain for the Suppression of the Slave Trade, Apr. 7, 1862 (signed), U.S.-G.B., T.S. 126, 13 Stat. 645; *Treaty of Peace and Amity between His Britannic Majesty and the United States of America (The Treaty of Ghent)*, Dec. 24, 1814 (signed), U.S.-G.B., T.S. 109, 8 Stat. 218, art. 10, ("the Traffic in Slaves is irreconcilable with the principles of humanity and Justice").

In the light of such history, affirmative action may certainly be used as a remedy:

> "The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

In *United States v. Paradise*, 480 U.S. 149 (1987), at least eight[3] Justices agreed that remedial affirmative action was not prohibited by the Constitution. *United States v. Paradise*, 480 U.S., at 167 ("The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor") (Brennan, J., plurality opinion); *Id.*, at 187 (the remedy "was narrowly drawn to achieve the goal of remedying the proven and continuing discrimination") (Powell, J., concurring opinion); *Id.*, at 194-195 ("The relief [here] ... must unavoidably consider race... [Courts] may, and in some cases must,

[3] The position of Justice White on this particular issue in *Paradise* is not clear, *United States v. Paradise*, 480 U.S., at 196 (White, J., dissenting), but in *United States v. Fordice*, 505 U.S. 717 (1992), he supported additional remedial measures by Mississippi's college and university system in light of past discrimination.

resort to race-conscious remedies to vindicate federal constitutional guarantees") (Stevens, J., concurring in the judgment); *Id.*, at 196 ("the Federal Government has a compelling interest in remedying past and present discrimination") (O'Connor, J., dissenting opinion). As recently as *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), at least seven of the nine Justices confirmed the continued vitality of remedial affirmative action. See *Adarand*, 515 U.S., at 2113-2114 (O'Connor, J.), at 2120 (Stevens, J., dissenting), at 2133 (Souter, J., dissenting), at 2135-36 (Ginsburg, J., dissenting).

For most of this Court, then, the question turns on the particulars -- the design and implementation of remedial affirmative action, and the appropriate standards of review.

II. THE CIVIL WAR AMENDMENTS WERE ADOPTED IN PART AS A REMEDY FOR THE CRIMES OF SLAVERY AND DO NOT REQUIRE 'COLOR BLIND' JURISPRUDENCE

A. THE HISTORICAL CONTEXT OF REPARATIONS FOR THE CRIMES OF SLAVERY

Congress embodied a variety of motivations in passing the Civil War Amendments. See *Brown v. Board of Education*, 347 U.S. 483, 489 (1954) ("The most avid proponents ... undoubtedly intended them to remove all legal distinctions... Their opponents, just as certainly were antagonistic to both the letter and the spirit"). Economic reparations for formerly enslaved Africans were discussed, but "a strong consensus developed among moderates and conservatives favoring equal protection of the law for all men." Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 Harv. C.R.-C.L. L. Rev. 1, 12 (1995).

Some federal attempts were made to provide economic reparation to formerly enslaved Africans. On January 16, 1865, General Sherman issued Field Order 15 that provided, among other things, up to forty acres of "tillable ground" to "respectable negroes, heads of families." Commission for Positive Education, *The Forty Acres Documents: What Did the United States Really Promise the People Freed From Slavery?* 52 (1994). However, consistent with the perspective that Congress preferred viewing the passage of the Civil War Amendments as reparations for the previously enslaved Africans and their descendants, in the Freedmen's Bureau Acts Congress provided land for a price to "loyal refugees" and thus the land was no longer free. 13 Stat. 507, 508-509 (1865). The Second Freedmen's Bureau Act revoked General Sherman's grant of up to forty acres and required validation of claims in order to purchase up to twenty acres of land. 14 Stat. 173, 175-176 (1866).

In the 1890s, the Ex-Slave Mutual Relief, Bounty and & Pension Association was formed. Under the leadership of Callie House and Rev. Isaiah Dickerson , this organization rallied the support of approximately 600,000 "ex-slaves" and their descendants to lobby Congress for the passage of legislation such as Senate Bill 4718, that called for a pension for "ex-slaves" and their descendants.[4] This effort was unsuccessful, as were attempts to obtain material reparations through litigation in the early 1900s[5] and in 1995. See *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995).

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[4] S.B. 4718, 55th Cong. (1898); see also Linda Allen Eustace & Imari A. Obadele, *Eight Women Leaders of the Reparations Movement USA* 6-8 (2000).

[5] Eustace & Obadele, *Eight Women Leaders.*, at 9.

The century following the Civil War is known as "Jim Crow." During Jim Crow, African Americans were excluded by government action from full participation in the social, political and economic institutions of the United States. C. Vann Woodward, *The Strange Career of Jim Crow* (1955). The cruel legacies of Jim Crow in education are very clear at the University of Michigan as well as throughout the United States. This historical record compels the demand for reparations, continued today by N'COBRA and NCBL, as well as other groups. Adjoa A. Aiyetoro, *The National Coalition of Blacks for Reparations in America: Its Creation and Contribution to the Reparations Movement, in* Should America Pay?: Slavery and the Raging Debate Over Reparations 209-210 (Ray Winbush, ed. 2003).

Education is a significant issue within the reparations movement for African Americans in the United States. Some legislative bodies have passed reparations legislation that focuses on the importance of education, recognizing that education is a major arena of discrimination, and therefore a focus of remedy.[6] Affirmative action in education is securely founded on principles of redress and reparation.

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[6] Adjoa A. Aiyetoro, *The National Coalition of Blacks for Reparations in America (N'COBRA): Its Creation and Contributions to the Reparations Movement, in* Should America Pay?: Slavery and the Raging Debate on Reparations 217 (Raymond A. Winbush, ed. 2003) (The Detroit City Council unanimously approved a resolution introduced by Councilman Clyde Cleveland to establish a $40 billion education fund for descendants of enslaved Africans); see also Kenneth B. Nunn, *Rosewood, in* When Sorry Isn't Enough 435-436 (Roy L. Brooks, ed. 1999) (Florida legislature passed Rosewood Compensation Act for the destruction of this African American community by white violence. The Act included the establishment of a scholarship fund for "minority persons with preference given to the direct descendants of the Rosewood families").

B. WHITE SUPREMACY UNDER 'COLOR BLIND' JURISPRUDENCE

For a fleeting moment immediately following the Civil War, the prospects for formerly enslaved Africans and other persons of color appeared bright. The Thirteenth Amendment abolished chattel slavery in all its forms. The Fourteenth Amendment transformed formerly enslaved Africans into citizens, and guaranteed due process and equal protection. The Fifteenth Amendment then extended the voting franchise to African American men. Large numbers voted in subsequent elections, and many held elective office in state governments and Congress. John Hope Franklin & Alfred A. Moss, Jr., *From Slavery To Freedom: A History of African Americans* 238-246 (7th ed. 1994).

The mood of tolerance and reparation for the devastation of slavery did not long endure. Before the adoption of the Fourteenth Amendment in 1866, several States created 'Black Codes' to perpetuate and enforce white supremacy, "to keep the colored race in a condition, practically, of servitude." *Civil Rights Cases*, 109 U.S. 3, 43 (1883) (Harlan, J., dissenting opinion). The Fourteenth Amendment was designed "[t]o meet this new peril to the black race, that the purposes of the nation might not be doubted or defeated." *Civil Rights Cases*, 109 U.S., at 43 (Harlan, J., dissenting opinion). As white supremacy became more entrenched, African Americans were disenfranchised economically and politically. See, *e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (Rehnquist, J.) ("the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks...to establish white supremacy"); Leon F. Litwack, *Trouble In Mind: Black Southerners In the Age of Jim Crow* (1998). Nor were the efforts to maintain white supremacy limited to the turn of the last century. In

Louisiana v. United States, 380 U.S. 145 (1965), Justice Black described the continuing ingenuity of the State of Louisiana in denying the voting franchise to African American citizens. The process began when the Louisiana Constitution of 1898 implemented a 'grandfather clause,' *Louisiana v. United States*, 380 U.S., at 147-148, and continued in an unbroken string of devious innovation into the 1950's, when a "legislative committee to preserve white supremacy" was activated. *Id.*, at 149. Finally, in 1965, this Court found Louisiana's voting practices to violate the Fifteenth Amendment. *Louisiana v. United States*, 380 U.S., at 153.

White supremacy as an official ideology could not have survived a robust interpretation of the Civil War Amendments in favor of African Americans. The Court eventually agreed with this interpretation nearly a century later. See *Jones v. Mayer Co.*, 392 U.S. 409 (1968); *Loving v. Virginia*, 388 U.S. 1 (1967); *United States v. Mississippi*, 380 U.S. 128 (1965); *Louisiana v. United States*, 380 U.S. 145 (1965); *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964); *Brown v. Board of Education*, 347 U.S. 483 (1954). In the intervening nine or ten decades, the Civil War Amendments suffered retrenchment to the detriment of African Americans, supporting the myth of white supremacy and African American inferiority. White supremacy flourished under the banners of states' rights, limitations on federal power, narrow readings of the Constitutional text, and 'color blind' jurisprudence.

In *United States v. Cruikshank*, 92 U.S. 542 (1875), the Court dismissed indictments brought under the Enforcement Act of 1870, 16 Stat. 140. With gruesome facts, the defendants had been found guilty in the Circuit Court for the District of Louisiana of depriving Constitutional and other rights due to "citizens of the United

States, of African descent and persons of color." *United States v. Cruikshank*, 92 U.S., at 548. In a federalism discourse on the near-exclusive authority of states to define and protect the lives of citizens found therein, Chief Justice Waite shortened the reach of the Fourteenth Amendment, *Id.*, at 554-555, and dismissed the indictments. *Id.*, at 556-57, 559.

In *The Civil Rights Cases*, 109 U.S. 3 (1883), the Court found unconstitutional provisions of the Civil Rights Act of 1875, which prohibited racial discrimination in certain public accommodations. 18 Stat. 335. The Court found that these forms of discrimination were not "badges or incidents of slavery" prohibited under the Thirteenth Amendment and required a showing of state action before proceeding under the Fourteenth Amendment. *The Civil Rights Cases*, 109 U.S., at 24-26. Absent the requisite discriminatory state action, the statute was ruled unconstitutional in the sense that the Constitution did not authorize Congress to exercise power to regulate these forms of discrimination. *Ibid.* Eighty-one years later, Congress revisited the issue with the Civil Rights Act of 1964, upheld by the Court reading the identical texts of the Constitution. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (applying a commerce clause analysis).

In a group of cases decided in a single Term, the Court employed its 'color blind' jurisprudence while ignoring the racially disparate effects, examining state laws which excluded African Americans from juries. Each case involved appeals of African Americans accused of murdering whites. *Strauder v. West Virginia*, 100 U.S. 303 (1878); *Virginia v. Rives*, 100 U.S. 313 (1879); see also *Ex Parte State of Virginia*, 100 U.S. 339 (1878). The Court allowed facially 'color blind' statutes to stand, while striking down blunter attempts to keep African Americans out of jury

pools. In *Strauder v. West Virginia*, 100 U.S., at 310, a state law clearly excluding African Americans from jury pools was found to have violated the Equal Protection Clause of the Fourteenth Amendment. However in *Virginia v. Rives*, 100 U.S., at 321-323, a more sophisticated, facially 'color blind' Virginia juror selection system was upheld, even though it had the effect of excluding all African Americans. The drafting lesson was not lost on the States, which soon designed 'color blind' statutes with clear discriminatory intent and effect. Just such a juror qualification law was upheld in *Gibson v. Mississippi*, 162 U.S. 565 (1896), involving a provision under the infamously racist Mississippi Constitution of 1890. The 'color blind' language of *Gibson* sounds compelling: "the constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government, or by the states, against any citizen because of his race," *Gibson v. Mississippi*, 162 U.S., at 591 *quoted in Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216 (1995) (O'Connor, J.) *quoting Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Nevertheless, the petitioner was identified as a "Negro of the African descent and color black," *Gibson v. Mississippi*, 162 U.S., at 567 and the murder victim was "a white man." *Id.*, at 569. In the era of Jim Crow, the wisdom of a 'color blind' approach was lost on the millions condemned to oppression. See Leon F. Litwack, *Been In the Storm So Long: The Aftermath of Slavery* (1979).

Similar 'color blind' language can be found in a line of unfortunate cases praising the Civil War Amendments while gutting their protections. See *The Civil Rights Cases*, 109 U.S. 3, 24 (1883) ("The thirteenth amendment has respect, not to distinctions of race, or class, or color, but to slavery. The fourteenth amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any

individual, the equal protection of the laws.") (finding the Civil Rights Act of 1875 unsupported by the Civil War Amendments); *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) ("The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law") (permitting "equal, but separate" public accommodation on Louisiana railroads); *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926) ("all persons and citizens shall have equal right with white citizens to make contracts and acquire property") (dismissing case for want of jurisdiction, permitting enforcement of racially restrictive real estate covenants); and *Hirabayash v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people") (upholding wartime curfew restrictions upon persons of Japanese ancestry) *quoted in Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, at 214 (1995) (O'Connor, J.). In *Hodges v. United States*, 203 U.S. 1, 16-17 (1906), no Constitutional infirmity was found against a private conspiracy to forcibly prevent African American citizens from working, solely on the basis of their race and color. The 'color blind' analysis of the Court stated:

> "While the inciting cause of the [Thirteenth] Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the nation. It is the denunciation of a condition, and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the nation, it commits every race and every individual thereof." *Hodges v. United States*, 203 U.S., at 16-17.

These cases are the oration of Brutus, praising the one he has slain;[7] they were the federal pillars of white supremacy for nearly a century, shamelessly professing 'color blind' equality while turning a blind eye to the harsh reality of life as an African American during Jim Crow.

C. JUSTICE HARLAN AND THE CIVIL WAR AMENDMENTS

Not every Justice uniformly supported a shameless version of 'color blind' jurisprudence. A few lone voices of dissent may be heard during Jim Crow, most notably the pen of Justice Harlan. Modern proponents of 'color blind' jurisprudence are fond of quoting Justice Harlan's dissent in *Plessy v. Ferguson* without noting his clear purpose to protect and uplift African Americans. See, *e.g.*, *Berea College v. Kentucky*, 211 U.S. 45, 67 (1908) (Harlan, J., dissenting) (the Kentucky statute is "an arbitrary invasion of the rights of liberty and property guaranteed by the 14th Amendment against hostile state action") (majority upholds a Kentucky statute which forbids Berea College from teaching white and black students together); *Hodges v. U.S.*, 203 U.S. 1, 37 (1906) (Harlan, J., dissenting) ("The interpretation now placed on the 13th Amendment is, I think, entirely too narrow, and is hostile to the freedom established by the Supreme Law of this land") (majority denies federal jurisdiction to allegations of conspiracy to deny blacks the right to contract and seek employment); *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) ("Our constitution is color blind ... it is therefore to be regretted ...

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[7] "If then that friend demand why Brutus rose against Caesar, this is my answer: -- Not that I loved Caesar less, but that I loved Rome more...As Caesar loved me, I weep for him; as he was fortunate, I rejoice at it; as he was valiant, I honour him: but, as he was ambitious, I slew him. There is tears for his love; joy for his fortune; honour for his valour; and death for his ambition." William Shakespeare, Julius Caesar, Act 3, Scene 2.

for a state to regulate the enjoyment of citizens of their civil rights solely upon the basis of race ... the judgment this day rendered will, in time, prove to be quite as pernicious as ... the Dred Scott Case") (majority affirms 'equal, but separate' common carrier transportation in Louisiana as permissible under the Thirteenth and Fourteenth Amendments); but see *Gibson v. Mississippi*, 162 U.S. 565 (1896) (Harlan, J.).

In his dissent in *The Civil Rights Cases*, 109 U.S. 3, at 26, Justice Harlan attempted to focus the Court's attention upon the "substance and spirit of the recent amendments of the constitution," as well as the Civil Rights Act of 1866, now codified at 42 U.S.C. § 1981. He insisted that the Thirteenth Amendment should be read to give Congress the power "to the extent at least of protecting the race, so liberated, against discrimination, in respect of legal rights belonging to freemen, where such discrimination is based upon race." *Id.*, at 37. The legacies of slavery did not disappear upon emancipation, but "such discrimination is a badge of servitude, the imposition of which congress may prevent under its power, through appropriate legislation, to enforce the thirteenth amendment." *Id.*, at 43.

The Justices in *The Civil Rights Cases* would support Respondents in the cases before this Court today. The Court struck down the Civil Rights Act of 1875 essentially on federalism grounds – that such power to remedy private discrimination had not been granted to Congress and thus was reserved to the States, but noting with approval that States themselves could prohibit such discrimination. *The Civil Rights* Cases, 109 U.S., at 25. If the State of Michigan had passed a *Michigan* Civil Rights Act in 1875, the Court would have upheld it as a State power not forbidden under the Thirteenth and Fourteenth Amendments. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) ("[T]he Court in the Civil Rights Cases ... noted with

approval the laws of 'all of the states' prohibiting discrimination."). This present Supreme Court should do no worse.

III. STRICT SCRUTINY IS NOT THE PROPER STANDARD OF REVIEW FOR REMEDIAL AFFIRMATIVE ACTION

A. RACIAL CLASSIFICATIONS ARE INCIDENTAL TO REMEDIAL AFFIRMATIVE ACTION

Amici are not unmindful of this Court's announced standards of strict scrutiny for racial classifications in cases such as *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995) ("any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny"). As the number of minority groups covered by racial preferences has multiplied, the wider utilization of race as a category has attracted strict scrutiny. See, *e.g.*, *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477-478, 506 (O'Connor, J.) ("the gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation"). Although reparations narrowly tailored to the crimes of slavery and *de jure* racial discrimination could meet the strict scrutiny test, a less stringent Constitutional standard should apply.

The choice of race as a classification system to deny fundamental human rights for Africans was made by the oppressors, not the Africans. The category originated in white supremacy in the Colonial period, and was later imprinted upon the Constitution. Several provisions of the

Constitution bore racial distinctions, such as the Slave Import clause, U.S. Const., Art. I, Sec. 9, the Three-Fifths clause, U.S. Const. Art. I, Sec. 2, Cl. 3, *amended by* Amend. XIV, Sec. 2, and the provisions regarding citizenship which were interpreted in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), to deny citizenship to African descendants. See William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (1977); Don E. Fehrenbacher, *The Slaveholding Republic* (2001). For approximately a century following Emancipation, *de jure* racial discrimination flourished. Government supplied the racial definitions and enforced compliance.

When remedies are fashioned for these crimes, the alarm is raised with feigned surprise that all of the beneficiaries are members of a particular race. How could it possibly be otherwise? If all of the oppressed people are of a certain race then it is highly disingenuous to complain of that very fact when a remedy is designed. Perhaps this circumstance should not be viewed as a racial classification at all; it is fundamentally a classification based on common injury. Reparations for such crimes can be narrowly tailored to benefit the oppressed and their descendants without becoming a racial classification, perhaps even to the satisfaction of Justice Scalia: "individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race." *Adarand*, 515 U.S., at 239 (Scalia, J., concurring in part and concurring in the judgment). Such reparations do not require racial classification at all because the classification is based on common injury. A few examples will illustrate:

In *Korematsu v. United States*, 323 U.S. 214 (1944), the Court upheld the internal relocation and confinement of persons of Japanese ancestry during the Second World War.

Decades later, groups of Japanese Americans sued for damages, *United States v. Hohri*, 482 U.S. 64 (1987). See also The Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988) (authorizing payment of reparations to Japanese Americans interned during World War II).

While the Civil Liberties Act of 1988 primarily benefits persons of Japanese ancestry, that fact is incidental. The racial category was applied by the wartime commanders and leaders who insisted on exclusion and internment. The Civil Liberties Act of 1988 does not employ a suspect racial classification, but merely seeks to remedy, after careful Congressional study, injustice committed on the basis of race. See *Obadele v. United States*, 52 Fed. Cl. 432 (2002).

Likewise, in the last decades, many Holocaust victims and their descendants have received hundreds of millions of dollars in reparations for crimes against humanity during the era of the Nazi regime. See Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* 3-156 (2000). Most of the Holocaust reparation recipients are Jewish, although other distinct ethnic groups have also received some reparations, such as the Roma. Are these ethnic, religious or racial categories 'immediately suspect,' *Korematsu v. United States*, 323 U.S. 214, 216 (1944), or are they merely reflective of the crimes against humanity, and thus entirely appropriate? Reparations to survivors and their descendants are entirely appropriate and do not run afoul of the Equal Protection Clause of the Fourteenth Amendment.

The history of systemic racism in America is hideous and corrosive, and the Fourteenth Amendment does not require race crimes to be ignored. Freed from the albatross of a "suspect racial classification" analysis, affirmative action in education designed as reparations for the crimes of

slavery and *de jure* racial discrimination should be subject to mere ordinary Constitutional scrutiny, rather than any stricter formulation.

B. THE REMEDIAL PURPOSES OF THE FOURTEENTH AMENDMENT ARE OF PARAMOUNT IMPORTANCE AND SHOULD NOT BE SUBJECTED TO STRICT SCRUTINY

This Court first interpreted the Thirteenth, Fourteenth and Fifteenth Amendments in *The Slaughter-House Cases*, 83 U.S. 36, 67 (1872), enshrining the Civil War Amendments in the heroic language of "human rights," *The Slaughter-House Cases*, 83 U.S., at 67-68, and clearly described the purpose of the Amendments:

> "[T]he one pervading purpose in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.*, at 71.

So certain was the Court of the exclusive focus of the Civil War Amendments, that Justice Miller mused:

> "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other." *The Slaughter-House Cases*, 83 U.S., at 81.

This Court has long recognized that any remedial program under the Civil War Amendments must be balanced against a desire to transcend the pernicious use of racial categories. One should not lose sight, however, of the magnitude of the gap between white and African American citizens, both in 1865 and today. An important purpose of the Civil War Amendments was to close that gap in important respects, and yet much of that goal was frustrated for a century by the law. See Part II, *ante*.

Remedial affirmative action may be utilized without creating a permanent "racial entitlement" as feared by Justice Scalia in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (Scalia, J., concurring in part and concurring in judgment). As Justice Harlan explained:

> "My brethren say that when a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws." *The Civil Rights Cases*, 109 U.S. at 61.

Have the laws of Michigan, other States and the federal laws of the United States, from Emancipation to today, treated African Americans as "the special favorite of the law?" Absolutely not. Certainly from Reconstruction to 1964, white supremacists held the upper hand.

Have African Americans "shaken off" the consequences of the disaster of enslavement and enjoyed the same economic and social conditions as white Americans? Absolutely not. Unlike descendants of immigrant groups that came to the United States willingly, African Americans still are disadvantaged in Michigan and throughout the United States in terms of education, wealth, income, health and employment, direct manifestations of past and present systemic racial discrimination. See *Respondents' Briefs on the Merits*.

The emergence of affirmative action in the last generation ushered a remedial response to these continuing consequences of chattel slavery, including its progeny, *de jure* discrimination. To abandon this remedy when the gap remains wide is to abandon the mission of the Civil War Amendments.

IV. REMEDIAL AFFIRMATIVE ACTION IS CONSISTENT WITH UNITED STATES TREATY OBLIGATIONS UNDER THE *CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION*

The *Convention on the Elimination of All Forms of Racial Discrimination (CERD)* forbids all racial discrimination and demands recognition of human rights and fundamental freedoms on an "equal footing." *Convention on the Elimination of All Forms of Racial Discrimination*, K.A.V. 2307, 5 I.L.M. 352 (1966), 660 U.N.T.S. 195, 216-218, art. 2, ¶ 1. In this regard, the *CERD* adopts a rule roughly congruent with the Equal Protection clause.

The *CERD* also recognizes an exception for remedial affirmative action, so long as the remedy does not outlast the

injury. *Convention on the Elimination of All Forms of Racial Discrimination*, K.A.V. 2307, 5 I.L.M. 352 (1966), 660 U.N.T.S. 195, 216-218, art. 1, ¶ 4, art. 2, ¶ 2. Under *CERD*, remedial affirmative action is not only permissible, but may be obligatory.

At last count, one hundred and fifty-seven nations have ratified the *CERD*, including the United States, one of the last to ratify. The United States Senate ratified the *CERD* on June 24, 1994, 140 Cong. Rec. 14,326 (1994), by the required two-thirds majority. U.S. Const. art. II, § 2. Under Article VI of the Constitution, ratified treaties become supreme Federal law, overruling contrary Federal laws, as well as contrary provisions in State laws or State Constitutions. U.S. Const. art. VI.

The Senate ratification contained several reservations, none of which touched upon Equal Protection or affirmative action. 140 Cong. Rec., at 14,326. The Senate also included a declaration that the *CERD* was not "self-executing," *ibid.*

On December 10, 1998, President Clinton issued Executive Order 13107, establishing the policy of the United States to respect and fully implement certain human rights treaties, including the *CERD*. Exec. Order No. 13107, 3 C.F.R. 234 (1999).

Even in light of the Senate's declaration, and giving minimal effect to Executive Order 13107, the *CERD* represents a valid treaty obligation of the United States, supporting the remedial use of affirmative action as consistent with both racial non-discrimination and equal protection. Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 Mich. J. Int'l L. 301 (1999). While a mere treaty never

overrides the United States Constitution, this Court should pause thoughtfully before restricting remedial affirmative action in education on Equal Protection grounds, and consider the provisions of the solemn treaty ratified by the vast majority of world's nations, including the United States of America. Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 Mich. J. Int'l L. 659 (1997).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), and the decision of the district court in *Gratz v. Bollinger*, 122 F. Supp.2d 811 (E.D. Mich. 2000), should be affirmed.

Respectfully submitted,

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